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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: The Standard Register Company

File: B-289579

Date: March 5, 2002

Anthony W. Hawks, Esq., for the protester.

Drew Spalding, Esq., Government Printing Office, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Fact that prior contracts on which protester experienced performance problems were performed at facilities different from the one to be used for current contract did not preclude agency from considering the contracts in finding protester nonresponsible.

DECISION

The Standard Register Company protests the award of a contract to Monarch Litho, Inc. under invitation for bids (IFB) No. 484-733, issued by the Government Printing Office (GPO) for production of integrated card production systems. Standard asserts that the agency improperly determined that it was nonresponsible.

We deny the protest.

The IFB sought bids for the production and delivery of 4.5 million sets of envelopes and envelope carriers for use by the Immigration and Naturalization Service. Delivery was to be made in increments of 1.125 million sets on each of four dates, beginning January 14 and ending March 18, 2002. Both Standard and Monarch submitted responsive bids, with Standard's the apparent low bid at \$382,050. Because Standard's bid was low, the contracting officer investigated the firm's past performance to assess its responsibility. This included examination of Standard's performance of contract No. 477-716, performed at Standard's Maryland facility, and contract No. 0621-S, which (agency records show) was to be performed at Standard's Kirksville, Missouri facility, the same facility proposed for performance of this requirement, but which Standard moved to its York, Pennsylvania facility after award. Based on unfavorable reports, including a 100-percent late performance

report for contract No. 0621-S, the contracting officer determined that Standard was nonresponsible. After finding Monarch responsible, the contracting officer made award to Monarch for \$418,814. Standard challenged this decision in an agency-level protest, which GPO denied; Standard then filed this protest with our Office.

Standard does not dispute that it experienced the performance problems which led to the agency's nonresponsibility determination; rather, it claims the information the contracting officer considered was not relevant to the solicited work, and did not show that Standard had significant performance problems. Supplemental Comments at 2.

A contracting agency has broad discretion in making responsibility determinations, since the agency must bear the effects of any difficulties experienced in obtaining the required performance. Blocacor, LDA, B-282122.3, Aug. 2, 1999, 99-2 CPD ¶ 25 at 4. Thus, a contracting officer has the discretion to determine the weight to be accorded the information he or she receives concerning a bidder's past performance, that is, to determine whether that past performance indicates there will be problems on the contract to be awarded. Mine Safety Appliances Co., B-266025, Jan. 17, 1996, 96-1 CPD ¶ 86 at 25. Although responsibility determinations must be based on fact, and reached in good faith, they are of necessity a matter of business judgment. Blocacor, LDA, *supra*. We will not question a nonresponsibility determination absent bad faith on the part of agency officials or the lack of a reasonable basis for the determination. EPCo Assocs., B-238015, Apr. 13, 1990, 90-1 CPD ¶ 388 at 5.

The nonresponsibility determination here was reasonable. The agency reports that there were "numerous unexcused problems performing adequately" on contract No. 0621-S, including 6 (out of 6) print orders that were late by 23 to 77 days. Contracting Officer's Declaration ¶ 7. Similarly, contract No. 477-716 was for the same items sought in this procurement, and the agency reports that Standard had "significant problems performing . . . both in terms of quality and timeliness." *Id.*, ¶¶ 7-8. The contract at issue is for printing and delivery of 4.5 million sets of documents, with the first of four deliveries of 1.125 million sets due some 35 days after award, and the last due some 94 days after award. In view of this relatively short delivery schedule, the information regarding Standard's poor record producing these same items and its late deliveries of other printed materials was unquestionably relevant to the determination of its responsibility, and supported the agency's negative finding. In our view, Standard's poor performance of these two relevant contracts provided a reasonable basis for the contracting officer's nonresponsibility determination.

Standard asserts that it was improper for the agency to base its nonresponsibility determination on Standard's performance on contract Nos. 0621-S and 477-716, because neither of these contracts concerned performance at its Kirksville facility. In this regard, according to Standard, GPO has traditionally determined a bidder's responsibility based on its performance at the offered production facility.

This argument is without merit. First, since past practice lacks the force and effect of law, GPO was not bound by its alleged prior approach to determining responsibility. See BMY, Div. of Harsco Corp., B-233081, B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67 at 6 (internal agency policy not binding on agency because it lack force and effect of law). There is no other reason why the agency could not consider Standard's past performance at facilities other than that proposed for this contract. Considering such past performance information is not precluded by GPO's Printing Procurement Regulation (PPR) (see Ch. 1, § 5, ¶ 5(2), (4)), and it obviously is well within an agency's discretion to consider any relevant past performance information in determining a firm's responsibility. While performance at the same facility well may be the most relevant kind of past performance information, the manner in which a firm has carried out its contractual obligations at other facilities also is relevant to predicting whether it will satisfactorily perform the new contract. See BMY, Div. of Harsco Corp., supra (contracting officer properly considered delinquent contract performance at different facility in finding firm nonresponsible).

We note, furthermore, that the record shows that some portion of contract No. 0621-S was in fact performed at Kirksville, and that Standard experienced performance problems prior to moving the contract to its York facility. Specifically, Standard's performance printout for contract No. 0621-S included the following notation based on information from the cognizant contract administrator:

Per [contract administrator] . . . Std. Register had numerous problems on this [contract]. Show causes, quality problems, etc., were employed against [contractor]. The job was even switched to another plant [without] success. This [contractor] is nonresponsible.

Agency Report, Tab G; Contracting Officer's Declaration ¶ 7. The statement that the job "was even switched to another plant [without] success" indicates that the work was being performed at the original facility--Kirksville--at the time the identified problems arose. The tenor of the notation, including the assessment of "nonresponsibility," makes clear that the agency considered the performance problems significant.¹ This information was consistent with the agency's negative findings with regard to contract No. 0621-S, and supported its nonresponsibility determination.

¹ Standard also asserts that the contracting officer mistakenly believed that it performed all of contract Nos. 0621-S and 477-716 at Kirksville. Supplemental Comments at 3. The record establishes otherwise. The notation on the 0621-S past performance sheet clearly notified the contracting officer that performance of that contract "had been switched" from Kirksville. As for contract No. 477-716, there is nothing in the record indicating that the agency believed that contract was performed at Kirksville.

Standard suggests that the agency should have examined its entire performance record at all of its more than 30 facilities. However, agencies are not required to investigate a firm's entire performance record; rather, it is the bidder's duty to establish that it is a responsible prospective contractor. See PPR, Ch. 1, § 5, ¶ 5(a); Yellowhorse Indus., B-250282, Jan. 12, 1993, 93-1 CPD ¶ 35 at 4. Moreover, even if there were evidence of a more positive performance history (Standard has furnished no details regarding the types of contracts performed at its other facilities, or the quality of its performance at those facilities), this would not alter the fact that there was ample evidence of significant performance problems on directly relevant work to support the nonresponsibility determination. See Pacific Photocopy and Research Servs., B-281127, Dec. 29, 1998, 98-2 CPD ¶ 164 at 4; Mine Safety Appliances Co., supra.

The protest is denied.

Anthony H. Gamboa
General Counsel